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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 260

UNITED STATES OF AMERICA EX REL. RICHARD EICHENLAUB, PETITIONER

v.

W. FRANK WATKINS, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK, OR SUCH PERSON, IF ANY, AS MAY HAVE THE SAID RICHARD EICHENLAUB IN CUSTODY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 20–22) is reported at 167 F. 2d 659.

JURISDICTION

The judgment of the Court of Appeals was entered May 3, 1948 (R. 23). On July 30, 1948, Mr. Chief Justice Vinson extended to September 3, 1948, petitioner's time to file a petition for a writ of certiorari (R. 24), and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the warrant for petitioner's deportation is subject to attack in the present habeas corpus proceeding on any of the grounds alleged here by petitioner, namely, that:

(1) He was not properly convicted of a crime specified in the relevant deportation statute.

(2) He was not an alien, because his denaturalization was had "by default on consent of the petitioner"; or

(3) The warrant of deportation did not contain sufficient findings.

STATUTES INVOLVED

Section 3 of Title VIII of the Act of June 15, 1917, entitled "An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," originally provided (40 Stat. 217, 226):

> Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both.

This section was amended by Section 6 of the Act of March 28, 1940, entitled "An Act to amend the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, to increase the penalties for peacetime violations of such Act," 54 Stat. 79, 80, to read as follows:

> * * * Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000.

Section 1 of the Act of May 10, 1920, c. 174, 41 Stat. 593–594, 8 U. S. C. 157, provides:

> That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor,[1] be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the resi-

[1] Under the authority of 1940 Reorganization Plan No. V, 54 Stat. 1238, "Attorney General" is substituted for "Secretary of Labor."

dence of aliens in, the United States," if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

* * * * *

(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

(a) An Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918;

* * * * *

STATEMENT

Petitioner first entered the United States on February 23, 1930 (R. 11), and was naturalized as an American citizen on December 17, 1936 (R. 5). Thereafter he visited Germany and returned to this country on August 20, 1937 (R. 5). On September 3, 1941, in the United States District Court for the Eastern District of New York, petitioner pleaded guilty (Pet. 3) to a charge of conspiracy to act as an agent for a foreign government without being registered with

the Secretary of State. Title VIII Sec. 3 of the Act of June 15, 1917, 40 Stat. 226, which made it an offense for such an agent to fail so to register, was originally codified as 22 U. S. C. (1934 ed.) 233, and the indictment referred to the section by that designation (see R. 14, 20).

On January 25, 1944, on petitioner's consent (Pet. 4), a judgment was entered in the United States District Court for the Southern District of New York, cancelling his United States citizenship (R. 12). Thereafter deportation proceedings were instituted against petitioner pursuant to the Act of May 10, 1920, c. 174, Secs. 1–3, 41 State. 593–594 (8 U. S. C. 157), and after a hearing before an Immigration Inspector and review by the Board of Immigration Appeals, both of whom made findings of fact (R. 12, 22), a warrant directing his deportation was issued on October 9, 1945 (R. 2–3). Thereupon petitioner filed a petition for a writ of habeas corpus in the District Court for the Southern District of New York (R. 5–9). The writ was granted (R. 3–4), and after the filing of a return (R. 10–13) and a hearing, it was dismissed (R. 14–15, 15–16). On appeal (R. 16–17), the Court of Appeals for the Second Circuit affirmed the order of the district court (R. 23).

ARGUMENT

1. Petitioner's primary contention (Pet. 7, 10–17) appears to be that he was not subject to deportation because his conviction in 1941 was not for an offense specified in Section 1 of the Act of May 10, 1920, 41 Stat. 593, 8 U. S. . 157, *supra*, pp. 3–4, the deportation statute under which the warrant was issued. In 1941 petitioner was sentenced on his plea of guilty to conspiring to violate 22 U. S. C. 233. This section was originally passed as part of the Act of June 15, 1917, c. 30, Title VIII, Sec. 3, 40 Stat. 226, *supra*, p. 2, and read:

> Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Section 6 of the Act of March 28, 1940, 54 Stat. 80, entitled "An Act to amend the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, to increase the penalties for peacetime violations of such Act," provided:

> Sections 1, 2, and 3 of title VIII of such Act, as amended, are amended by striking out of each of such sections "shall be fined not more than $5,000 or imprisoned not more than five years, or both", and inserting in lieu of the matter stricken out the following: "shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000."

The marginal identification of the earlier statute at 54 Stat. 80 reads, "40 Stat. 226. 22 U. S. C., §§ 231–233: Disturbance of foreign relations." In the 1940 and 1946 editions of the United States Code, Section 3, Title VIII of the Act of June 15, 1917, was renumbered 22 U. S. C. 601 instead of 22 U. S. C. 233. See 22 U. S. C., 1940 ed., p. 1909; 22 U. S. C., 1946 ed., p. 2271:

> CODIFICATION
>
> Former sections 233–233g are now sections of this title as follows: 233 is 601; * * *

It is clear, therefore, that what is currently designated 22 U. S. C. 601 is Section 3, Title VIII of the Act of June 15, 1917, as amended, which formerly was designated 22 U. S. C. 233.

Petitioner, having been convicted of conspiracy to violate this statutory provision, falls directly within the unambiguous provisions of the deportation statute, Section 1 of the Act of May 10, 1920, 41 Stat. 593, 8 U. S. C. 157. No amendment

to the deportation statute was passed to remove such offenders from its scope; and it is inconceivable that when Congress decided in 1940 that the offense warranted even greater penalties than were originally prescribed, the offenders were to be considered less undesirable aliens.

2. Upon denaturalization, petitioner became an alien. Even without applying the manifestly relevant and correct principle that the cancellation of naturalization for fraud in its procurement operates to revoke citizenship *ab initio,* thereby having the legal effect of rendering the person an alien at all times (*Rosenberg* v. *United States,* 60 F. 2d 475 (C. C. A. 3)), it is clear, under the express terms of the deportation statute, that, once petitioner was denaturalized, he was deportable because of the past conspiracy conviction, regardless of his status at the time of the conviction.

3. Petitioner is attempting in this proceeding collaterally to attack his conviction for conspiracy and the judgment of denaturalization entered against him. Since there is nowhere presented any basis for a contention that the courts which entered such judgments were without jurisdiction to act, the attacks on these judgments cannot be heard in this habeas corpus proceeding. *Knewel* v. *Egan,* 268 U. S. 442, 445; *Goto* v. *Lane,* 265 U. S. 393, 402; *In re Coy,* 127 U. S. 731, 758.

Further, the attacks are manifestly without substance. As to the conspiracy conviction, peti-

tioner pleaded guilty and was sentenced on his plea. Nowhere in the record is there any indication that his plea of guilty was not freely and intelligently entered. His present argument that "the indictment, to which petitioner pleaded guilty, [was] so vague and uncertain as to create serious doubt that the petitioner was even charged with violating any section enumerated in the Act of May 10, 1920, conviction of which would make the petitioner subject to deportation" (Pet. 3), is a belated afterthought, not cognizable in the present proceeding.[2] The habeas corpus court cannot look into the details of crime of which petitioner was convicted. *United States* v. *Day*, 54 F. 2d 336 (C. C. A. 2).

Similarly without merit is petitioner's attack on the decree of naturalization. The petition for certiorari states that the decree was entered "by default on consent of the petitioner without a hearing" (Pet. 3, 18–21). However, this contention is apparently being made for the first time in this Court. The petition for habeas corpus (R. 5–9) did not challenge the validity of the denaturalization decree; and neither of the courts below passed upon this question. Indeed, the petition for certiorari itself discloses (p. 18) that "petitioner has made a direct attack upon the

[2] The indictment does not appear in the record. The Court of Appeals said: "In 1941, he was convicted of the crime of having conspired to act as an agent for a foreign government without having registered. The indictment referred to 22 U. S. C. A. § 233." (R. 20.)

validity of this judgment of denaturalization in the same [i. e., District] Court, but that motion has been denied. An appeal from the District Court's decision has been taken to the Circuit Court of Appeals for the Second Circuit and is now pending."

In any event, the fact that petitioner consented to the entry of a denaturalization decree against him, as the petition for certiorari admits (p. 18), distinguishes this case from *Klapprott v. United States*, No. 42, now pending before this Court. The case would appear on its facts to be more closely akin to *United States* v. *Borchers*, 163 F. 2d 347, 349 (C. C. A. 2), certiorari denied, 332 U. S. 811.

4. Petitioner's final contention is that warrant of deportation did not contain sufficient findings of fact without what petitioner conceives to be the ruling in *Mahler* v. *Eby*, 264 U. S. 32. The record before this Court is not complete. The courts below had before them the certified file of the Immigration and Naturalization Service, which contained the findings of the Immigration Inspector and of the Board of Immigration Appeals. In this connection the court below said (R. 22):

> [Petitioner] also urges that the deportation warrant is defective, as not in accord with 8 U. S. C. A. § 157, since it states that he is "a member of the undesirable classes of alien residents enumerated in

said Act" and does not state that he, as an individual, has been found to be an "undesirable resident." He cites *Mahler* v. *Eby*, 264 U. S. 32. But there the Court said (p. 43) that the defect in the warrants had not been met by other matter in the record. Here we have an explicit finding in the administrative proceedings that relator "is an undesirable resident." It would serve no useful purpose to remand to permit amendment of the warrant to conform to that finding.

Petitioner has not denied that such explicit finding was made; nor does he contend that such finding, which preceded the warrant of deportation under attack, was unsupported by evidence.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for certiorari should be denied.

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